for The Defense

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The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

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SERVING SEARCH WARRANTS, RESIDENTIAL SANCTITY, AND THE "KNOCK-AND-ANNOUNCE" RULE: IT'S NOT JUST POLITE, *IT'S THE LAW!*

By Anna M. Unterberger
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As Miss Manners and Martha Stewart will tell you, the World of Etiquette revolves around certain rules. Don't use a cream soup spoon when serving consomme. Wear white shoes only between Memorial Day and Labor Day. When finished with a meal, place your fork upside down on the plate with the tines at ten o'clock.

And if you're a police officer serving a search warrant at someone's home, you'd better do it politely. Because if you don't knock, *and* announce who you are and what you're there to do, *and* give the occupants a "reasonable" amount of time to cease their activities and open the door, what you discover once inside may just, *and should*, be suppressed.

This article reviews the law regarding the "knock-and-announce" rule under:

- the Fourth and Fourteenth Amendments to the United States Constitution; [1]
- Arizona's "knock-and-announce" statute, A.R.S. § 13-3916(B); and
- two defenses typically raised by the State.

Please keep in mind that, as with any Fourth Amendment issue, a "knock-and-announce" issue is fact-intensive. Consequently, the factual portion of the issue must be preserved at the trial level via a detailed and comprehensive evidentiary hearing. As far as the legal-argument portion goes, the following should help.

Fundamental Rights Under The Fourth Amendment: Every Home Is a Castle

An accused has the right to be free from unreasonable searches and seizures under the Fourth and Fourteenth amendments to the United States Constitution.

The Fourth[2] and Fourteenth[3] Amendments to the United States Constitution forbid unreasonable searches and seizures by the State. *Ker v. California*, 374 U.S. 23, 30, 83 S.Ct. 1623, 1628 (1963).

> "Implicit in the Fourth Amendment's protection from unreasonable searches and seizures is its recognition of individual freedom. That safeguard has been declared to be 'as of the very

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> essence of constitutional liberty' the guaranty of which 'is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen.'" *Id.* at 32, 83 S.Ct. at 1629, *quoting from Gouled v. United States*, 255 U.S. 298, 304, 41 S.Ct. 261, 263 (1921).

Both the common law and the Fourth Amendment recognize the ancient adage that a person's home is their castle. "From earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest." *Miller v. United States*, 357 U.S. 301, 306-07, 78 S.Ct. 1190, 1194 (1958) (footnote omitted); *see also, Soldal v. Cook County*, 506 U.S. 56, 62, 113 S.Ct. 538, 544 (1992) (the Fourth Amendment "protects property as well as privacy"). "The fear of smashing in doors by government agents is based upon more than a concern that our privacy will be disturbed. It is based upon concern for our safety and the safety of our families." *United States v. Becker*, 24 F.3d 1537, 1540 (9th Cir. 1994), *quoting from United States v. Lockett*, 919 F.2d 585, 592 (9th Cir. 1990) (Fernandez, J., concurring). "Indeed, the minions of dictators do not kick in doors for the mere purpose of satisfying some voyeuristic desire to peer around and then go about their business. Something much more malevolent and dangerous is afoot when they take those actions. It is that which strikes terror into the hearts of their victims. The fourth amendment protects us from that fear as much as it protects our privacy ." *Id.*

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"It is axiomatic that 'physical entry into the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Welsh v. Wisconsin*, 466 U.S. 740, 748, 104 S.Ct. 2091, 2096 (1984), *quoting from United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134 (1972). The Fourth Amendment "forbids every search that is unreasonable; it protects all, those suspected or known as to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made . . . ." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357, 51 S.Ct. 153, 158 (1931).

"'[A] search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from what is dug up subsequently."

The Supreme Court "will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental -- i.e., constitutional -- criteria established by this Court have been respected." *Ker* at 34, 83 S.Ct. at 1630. The States may develop "workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible[.]" *Id.* (citation omitted).

"It goes without saying that in determining the lawfulness of entry . . . we may concern ourselves only with what the officers had reason to believe at the time of their entry." *Id.* at 41 n.12, 83 S.Ct. at 1634 n.12, *citing to Johnson v. United States*, 333 U.S. 10, 17, 68 S.Ct. 367, 370-71 (1948). "'[A] search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from what is dug up subsequently." *Ker* at 41 n.12, 83 S.Ct. at 1634 n.12, *quoting from United States v. Di Re*, 332 U.S. 581, 595, 68 S.Ct. 222, 229 (1948).

The "Knock-And-Announce" Rule As A Fourth Amendment Fundamental Right: Demanding Entry Before Breaking The Drawbridge

The "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." *Wilson v. Arkansas*, 514 U.S. 927, 929, 115 S.Ct. 1914, 1915 (1995). "Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the

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Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure." *Id.* at 934, 115 S.Ct. at 1918.

"[T]he presumption in favor of announcement would yield under circumstances presenting a threat of physical violence," "where a prisoner escapes from [the police] and retreats to his dwelling," and "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given." *Id.* at 936, 115 S.Ct. at 1918-19 (citations omitted). However, officer safety is actually *enhanced* by announcement because it gives the home-dweller notice that the police are not armed intruders breaking and entering for unlawful purposes. *Sabbath v. United States*, 391 U.S. 585, 589, 88 S.Ct. 1755, 1758 (1968). "For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment." *Wilson* at 936, 115 S.Ct. at 1919.

Furthermore, "[t]he brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed."

The Latest Joust Over The "Knock-And-Announce" Rule: *Richards v. Wisconsin*

Most recently, the United States Supreme Court unanimously ruled that the Fourth Amendment did *not* permit "a blanket exception to the knock-and-announce requirement" for the category of "felony drug investigation[s]." *Richards v. Wisconsin*, ___ U.S. ___, ___, 117 S.Ct. 1416, 1418 (1997). "It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment." *Id.* at ___ n.4, 117 S.Ct. at 1421 n.4. The Fourth Amendment's reasonableness requirement exists to "preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted -- even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'" *Id.*, *quoting from Minnesota v. Dickerson*, 508 U.S. 366, 380, 113 S.Ct. 2130, 2139 (1993) (Scalia, J., concurring).

The Court rejected the State's proposed "felony-drug-investigation" blanket exception to the Fourth Amendment's protections because "creating exceptions to the knock-and-announce rule based on the 'culture' surrounding a general category of criminal behavior presents at least two serious concerns." *Richards* at ___, 117 S.Ct. at 1420-21. "First, the exception contains considerable overgeneralization. . . . [W]hile drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a *substantial degree*." *Id.* at ___, 117 S.Ct. at 1421 (emphasis added). One example would be where "the police could know that the drugs being searched for were of a type or in a location that made them impossible to destroy quickly. In those situations, the asserted governmental interests in preserving evidence and maintaining safety may not outweigh the individual privacy interests intruded upon by a no-knock entry." *Id.* "[I]ndividuals should have an opportunity to themselves comply with the law and to avoid the destruction of property occasioned by a forcible entry. These interests are not inconsequential." *Id.* at ___ n.5, 117 S.Ct. at 1421 n.5. Furthermore, "[t]he brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed." *Id.*

The second concern was that "[i]f a per se exception were allowed for each category of criminal investigation that included a considerable -- albeit hypothetical -- risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless." *Id.* at ___, 117 S.Ct. at 1421. "Instead, in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement." *Id.*

The Court then adopted the "reasonable suspicion" test for the "no-knock" situation. "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id.* "Reasonable suspicion" is a "reasonable belief based on specific and articulable facts[.]" *Maryland v. Buie*, 494 U.S. 325, 337, 110 S.Ct. 1093, 1099-1100 (1990).

Looming On The Battlefield: *United States v. Ramirez*

The "knock-and-announce" saga continues in the United States Supreme Court with *United States v. Ramirez*, 91 F.3d 1297 (9th Cir. 1996), *cert. granted*, 117 S.Ct. 2478 (1997). The majority of a three-judge Ninth-

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Circuit panel held that Ramirez's Fourth Amendment and federal statutory rights were violated where: (1) there was no *specific* evidence that the person they were seeking inside the house "was armed, would use firearms against the officers, or that when he was faced with that show of force he would do anything violent at all[;]" (2) "before the break-in nothing developed on the scene which would have added to the circumstances already known[;]" and (3) property damage occurred. *Id.* at 1299, 1302, 1304.

According to the Supreme Court's calendar, oral argument was heard on January 13, 1998.

Violating Arizona's Knock-and-Announce Statute

The police violate A.R.S. § 13-3916(b)(1), Arizona's "knock- and- announce" statute, when they fail to wait a reasonable period of time after knocking and announcing their authority and purpose before entering an accused's home. Arizona's present knock-and-announce statute, A.R.S. § 13-3916(B), reads:

An officer may break into a building, premises, or vehicle or any part thereof, to execute the warrant when:

> 1. After notice of his authority and purpose, he receives no response within a reasonable time.
>
> 2. After notice of his authority and purpose, he is refused admittance.

Thus, the statute allows forced entry into a home when there is either *constructive* refusal (paragraph 1) or *actual* refusal (paragraph 2).

The present language was enacted in 1971, when the statute was numbered as A.R.S. § 13-1446(B).[4] *See*, Session Laws 1970, ch. 59, § 4; Session Laws 1971, Ch. 152, § 5. Before that amendment, the statute read in pertinent part:

> The officer may break open an outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance. . . .

Caselaw interpreting our knock-and-announce statute has evolved from 1969 through 1985.

The Arizona Supreme Court Cases

Our Supreme Court first reviewed A.R.S. § 13-1446 in *State v. Mendoza*, 104 Ariz. 395, 454 P.2d 140 (1969). There, the police did not knock, or announce their purpose, at all. Instead, they shook and pulled an outside screen door until it opened, and then opened the unlocked inner door. *Id.* at 397, 454 P.2d at 142. The Court held that the narcotics found in Mendoza's house should have been suppressed and reversed his conviction.

First, the Court relied upon federal caselaw interpreting a similar statute, 18 U.S.C. § 3109, which read:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

The Court then quoted from *Miller v. United States*,[5] where the United States Supreme Court recognized that the federal statute "seems to require notice in the form of an express announcement by the officers of their purpose for demanding admission. The burden of making an express announcement is certainly slight." *Mendoza* at 398, 454 P.2d at 143, *quoting from Miller* at 309, 78 S.Ct. at 1196.

"There must be some tangible, objective evidence, rather than the mere suspicion, intuition or 'hunch' of an enforcement officer, upon which a reasonable man could conclude that closed doors are harboring clandestine efforts to destroy or conceal evidence . . ."

Second, the Court recognized that there were no circumstances that justified violating the statute in Mendoza's case. "There is a lack of proof in the instant case to show that if the officers had announced their identity and purpose the occupant would have destroyed the evidence which they were attempting to seize." *Mendoza* at 399, 454 P.2d at 144. And the "common knowledge" that narcotics, the subject of the search, are "usually contained in tiny receptacles" that could be "easily and quickly destroyed" was insufficient to excuse compliance with the statute because acceptance of such evidence would make the statute "a nullity in narcotics cases." *Id.* "There must be some tangible, objective evidence, rather than the mere suspicion, intuition or 'hunch' of an enforcement officer,

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upon which a reasonable man could conclude that closed doors are harboring clandestine efforts to destroy or conceal evidence; then, and only then, a forcible invasion of the premises would be reasonable." *Id.*, *quoting from United States v. Blank*, 251 F.Supp. 166, 174 (N.D. Ohio 1966).

And third, the Court set forth the evidentiary test for reviewing whether the police officers' reasons for failing to comply with the statute were justified: "There must be *substantial evidence* which would cause the officers to believe that such evidence would be destroyed if their presence were announced." *Mendoza* at 399-400, 454 P.2d at 144-45 (emphasis added). In other words, there "must be more than the presumption that the evidence would be destroyed because it could be easily done." *Id.* at 399, 454 P.2d at 144.

"The Court also rejected as an exigent circumstance the fact that the search warrant had been executed for the purpose of discovering narcotics . . ."

Our Supreme Court reviewed a "constructive refusal" under A.R.S. § 13-1446 in *State v. Brady*, 105 Ariz. 592, 469 P.2d 77 (1970). The Court upheld the admissibility of evidence obtained from the defendant's apartment because the defendant's roommate constructively refused to admit the police after they identified themselves, told the roommate that they had a search warrant for the residence, and the roommate backed away from the locked screen door. "We hold this sufficient 'as would convince a reasonable man that permission to enter had been refused.'" *Id.* at 595, 469 P.2d at 80, *quoting from McClure v. United States*, 332 F.2d 19, 22 (9th Cir. 1964).

The next Supreme Court case was *State v. Bates*, 120 Ariz. 561, 587 P.2d 747 (1978). The police approached the home with a search warrant, looked through a window, and saw Bates sitting by the front door smoking a marijuana cigarette. One of the officers knocked and identified himself as "Jim." A voice responded "Jim who?" and the officer said "Jim, you know." The occupants apparently *didn't* know; they neither said anything else, nor made any discernible movement toward the door. The officer then stated that they were the police, they had a warrant, and to open the door. After three to five seconds with no answer or action from inside, they forcibly opened the door. Bates was convicted of unlawful possession of marijuana. *Id.* at 561-62, 587 P.2d at 747-48.

The *Bates* Court, citing to *Brady*, *supra*, began by noting that "what constitutes a refusal of admittance under A.R.S. § 13-1446(B) depends upon the circumstances of each case. We think that logic equally applicable to a determination of what constitutes a reasonable time under the first clause of A.R.S. § 13-1446(B)." *Bates* at 562, 587 P.2d at 748. Here, the police did not hear any sounds that "militated against delay." After the police announced, they "observed no one coming to the door, no movement by any of the occupants during the course of the entry, nor did [they] hear anything at all suspicious or unusual." *Id.* "Moreover, the police, here, had no prior information that the occupants of the apartment would be armed or dangerous." *Id.* at 563, 587 P.2d at 749.

The Court also rejected as an exigent circumstance the fact that the search warrant had been executed for the purpose of discovering narcotics, citing to *Mendoza*, *supra*. Furthermore, "[o]n the facts of this case, we do not agree that three to five seconds constitute 'lengthy inaction' sufficient to demonstrate constructive refusal of admittance." *Id.*

Finally, the Court, again citing *Mendoza*, enumerated the aims of the statute as "reducing the potential for violence towards officers and occupants of the house in which entry is sought, guarding against needless destruction and respecting individual privacy." The Court then reversed Bates's conviction and remanded his case to the trial court "for entry of judgment of acquittal." *Id.*

Our Supreme Court most-recently reviewed A.R.S. § 13-3916(B) in *State v. Sanchez*, 128 Ariz. 525, 627 P.2d 676 (1981). The central issue there was construction of the word "premises" and whether it applied to a fenced yard; the Court held that it did not. *Id.* at 528-29, 627 P.2d at 679-80. However, the Court took the opportunity to reiterate the purposes underlying the statute:

> "(1) protecting both occupants and law enforcement officers by preventing violent confrontation which may occur upon unannounced intrusions,
> (2) protecting individuals' rights of privacy in their homes as well as preventing unexpected exposure of occupants' private activities, and
> (3) preventing the destruction of property resulting from forced entry." *Id.* at 528, 627 P.2d at 679 (citations omitted).

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The Arizona Court Of Appeals Cases

In *State v. Eminowicz*,[6] our Court of Appeals recognized that Arizona does not allow the issuance and execution of "no knock" warrants, and that the police must comply with our "knock-and-announce" statute. By the time *Eminowicz* arose, the statutory language existed in its present form, although the statute was still numbered 13-1446. The Court held that entry made simultaneous with the police announcing who they were and that they had a search warrant, "*or at least prior to any time for a response*," failed to comply with the statute. *Id.* at 418-19, 520 P.2d at 331-32 (emphasis added).

"[F]orcible entry is still unreasonable and hence violative of the Fourth Amendment if the occupants of the premises sought to be entered and searched are not first given an opportunity to surrender the premises voluntarily."

Our Court of Appeals next held that affirmative evidence of destruction of contraband at the time of a warrant's service justified entry after six or seven seconds in *State v. Gaitan*, 27 Ariz. App. 718, 558 P.2d 746 (1976) (Division One). There, an officer went to Gaitan's house and called his name from the sidewalk. There was no response, so he went up to the open front door, knocked, called Gaitan's name again, and Gaitan appeared at a window. The officer asked if he could speak to Gaitan, who then told the officer to come in. After waiting outside for about thirty seconds, the officer heard movement within the house. He then announced that he was with State Narcotics and had a search warrant. Approximately six or seven seconds later he entered the house through the open door. Gaitan was arrested with several packets of heroin on his person. *Id.* at 720, 558 P.2d at 748.

"[I]t could be reasonably found that [the officer] heard noises inside the home which would lead him to believe the narcotics that were believed to be on the premises were being destroyed. . . . Under these circumstances . . . a wait of six to seven seconds after announcing [his] authority and purpose was a 'reasonable' time to wait before entering the residence and securing the Appellant." *Id.* at 722, 558 P.2d at 750. *See also*, *State v. Dixon*, 125 Ariz. 442, 444, 610 P.2d 76, 78 (App. 1980) (Division Two) (A.R.S. § 13-3916(B) was not violated where the police obtained a search warrant for heroin, were observed by someone in the mobile home as they approached, knocked and announced their purpose, heard scurrying noises, and entered the trailer a few seconds later.); *State v. Dudgeon*, 13 Ariz. App. 464, 467, 477 P.2d 750, 753 (1970) (Division Two) (A.R.S. § 13-1446(B) was not violated where the police knocked at Dudgeon's dormitory door, announced who they were and that they had a search warrant, heard some "scuffling" inside the room, waited less than five or six seconds, received no response, and unlocked the door with a key. These facts presented "substantial evidence" that evidence was about to be destroyed.) But compare, *State v. Chagnon*, 115 Ariz 178, 181, 564 P.2d 401, 404 (App. 1977) (Division One). Chagnon's conviction was reversed due to a violation of § 13-1446(B) where the police knocked, did not announce, and opened the door two seconds later, after they had seen someone leave a kitchen table (marijuana was allegedly in the refrigerator) and start toward the living room when they approached. This did not present "substantial evidence" that evidence was about to be destroyed.

Several other cases from our Court of Appeals, mostly Division Two, have reviewed, or at least commented upon, A.R.S. § 13-3916(B):

- *State v. Wright*, 131 Ariz. 578, 643 P.2d 23 (App. 1982) (Division Two). "The 'knock and announce' rule serves two basic purposes: protection of the individual's right to privacy in his home and reduction of the possibility of harm inherent in an unannounced entry." *Id.* at 580, 643 P.2d at 25.

  Furthermore, "even where the police duly announce their identity and purpose, forcible entry is still unreasonable and hence violative of the Fourth Amendment if the occupants of the premises sought to be entered and searched are not first given an opportunity to surrender the premises voluntarily." *Id.*, *quoting from Commonwealth v. DeMichel*, 441 Pa. 553, 277 A.2d 159, 163 (1971). The appellants, who were being held at the back of the house by one officer, could have yelled permission to enter to the officers at the front door, who knocked and announced, waited ten seconds, knocked again, and then broke in. Thus, the entry did not violate the statute. *Wright* at 579-80, 643 P.2d at 24-25.

- *State v. LaPonsie*, 136 Ariz. 73, 664 P.2d 223 (App. 1982) (Division Two). Simultaneous announcement and entry through a wide-open front door did not constitute waiting "a reasonable time." *Id.* at 74-75, 664 P.2d at 224-25.

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Furthermore, "[t]he only exigent circumstance allowed by the Arizona courts to date is where the police have substantial evidence to cause them to believe that evidence would be destroyed if they hesitated before entry," which did not apply to the seventy to eighty pounds of marijuana involved here. *Id.* at 75, 664 P.2d at 225.

- *State v. Albe*, 148 Ariz. 87, 89-90, 713 P.2d 288, 290-91 (App. 1984) (Division One). A.R.S. § 13-3916 does not apply to probation-revocation cases. The Court reiterated that the statute "has two purposes: 'protection of the individual's right to privacy in his home and reduction of the possibility of harm inherent in an unannounced entry,'" *quoting from Wright, supra.*

"Also important are avoidance of violent confrontations attendant to unannounced entries, prevention of destruction of property, and preventing unexpected exposure of private activities."

- *State v. Papineau*, 146 Ariz. 272, 705 P.2d 949 (App. 1985) (Division Two). The exigent circumstance of destruction of evidence (marijuana) justified entry through an unlocked door five to ten seconds after knocking, announcing, and hearing "rustling" movements inside. Also, someone looking through a window saw the officers approaching, and that person could have opened the door immediately. *Id.* at 273, 705 P.2d at 950, *relying on Dixon, supra.* "The right which knock- and-announce rules provide occupants is the right to be warned that their privacy is about to be legally invaded." *Id., quoting from Sanchez, supra.* "Also important are avoidance of violent confrontations attendant to unannounced entries, prevention of destruction of property, and preventing unexpected exposure of private activities." *Id., citing to Sanchez, supra, and Wright, supra.*

Be Prepared for the State to Defend with the "Independent Source" and "Inevitable Discovery" Doctrines

The Arizona appellate courts have yet to address the validity of these doctrines in the "knock-and-announce" context. Here's why our courts should reject such arguments.

The "Independent Source" Doctrine Does Not Apply To "Knock-And-Announce" Cases

The "independent source" doctrine was announced in *Segura v. United States*,[7] which was *not* a knock-and-announce case. There, the police arrested the defendant, took him to his apartment and knocked on the door. A woman answered, and the police entered without requesting or receiving permission. They told the occupants that they had arrested Segura *and were getting* a search warrant. They then conducted a limited security check and, in plain view, saw evidence of drug trafficking. *Id.* at 800-01, 104 S.Ct. at 3383.

The police obtained their search warrant the day after this illegal entry and confiscated the evidence. The evidence was admissible because "the warrant and the information on which it was based were unrelated to the entry and therefore constituted an independent source for the evidence[.]" *Id.* at 799, 104 S.Ct. at 3382, *citing to Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182 (1920). Where evidence is "the product of [a] search" that was "wholly unrelated to the prior entry," then the "link between the illegality and that evidence [is] sufficiently attenuated to dissipate the taint." *Segura* at 814-15, 104 S.Ct. at 3390-91.

For example, "[h]ad the police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and *seized precisely as it was here.*" *Id.* at 814, 104 S.Ct. at 3390 (emphasis added). *See also, Murray v. United States*, 487 U.S. 533, 539-40, 108 S.Ct. 2529, 2534 (1988) (The "independent source" doctrine saves evidence in situations where an illegal entry does not affect "either the law enforcement officers' *decision to seek* a warrant or the magistrate's *decision to grant* it.") (emphasis added).

At least one federal appellate court has rejected the use of the "independent source" doctrine in "knock-and-announce" cases. *United States v. Marts*[8] involved a violation of the federal "knock-and-announce" statute during service of a valid search warrant. The police knocked on the door quickly two or three times and announced, "Police officers — search warrant." They then waited less than five seconds, opened the unlocked door and entered. They did not hear or see anything inside the trailer, and they did not have any information that Marts

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was dangerous or might use guns against them. They knew that nine months before, an informant saw numerous firearms in the trailer during a drug transaction. *Id.* at 1217.

Here, the police violated the statute because "[o]ne cannot fairly infer a refusal merely from the lapse of less than five seconds[.]" *Id.* at 1217-18. "[A] ruling which excuses actions which would otherwise constitute clear misconduct, based upon the subjective fears and beliefs of officers, would emasculate the rule, reducing it to nothing more than a 'knock and enter' rule." *Id.* at 1218. Applying the "independent source rule" would make the "knock and announce rule" meaningless because "an officer could obviate illegal entry in every instance simply by looking to the information used to obtain the warrant. . . . [O]fficers, in executing a valid search warrant, could break in doors of private homes without sanction." *Id.* at 1220. The statute "is a congressional mandate; the violation of it makes the search unreasonable per se." *Id.* The Court distinguished *Segura*: "The significant factor in *Segura* is that the search warrant and the evidence seized under it were totally unrelated to the illegal entry. In the present case the search warrant, although legally obtained, was executed in violation of [the statute], and its execution was directly connected to the illegal entry." The evidence was suppressed. *Id.*

"[A] ruling which excuses actions which would otherwise constitute clear misconduct, based upon the subjective fears and beliefs of officers, would emasculate the rule, reducing it to nothing more than a 'knock and enter' rule."

The "Inevitable Discovery" Doctrine Does Not Apply To "Knock-And-Announce" Cases

First, it appears that under our state constitution, the "inevitable discovery" doctrine is inapplicable to home searches. In *State v. Ault,*[9] the police entered Ault's home without a warrant or his permission, saw potential evidence and seized it. They obtained a search warrant later that day and seized additional potential evidence. *Id.* at 462, 724 P.2d at 547. Our Supreme Court suppressed the evidence obtained during the first search "as primary evidence obtained as a direct result of police misconduct." *Id.* at 466, 724 P.2d at 552. "The illegal search of defendant's home directly produced [the evidence]. We choose not to allow the inevitable discovery doctrine to reach into homes of citizens in the factual situation before us." *Id.* at 465, 724 P.2d at 552. "Our decision not to extend the inevitable discovery doctrine into defendant's home in this case is based on a violation of art. 2 § 8 of the Arizona Constitution regardless of the position the United States Supreme Court would take on this issue." *Id.* at 466, 724 P.2d at 552. "We strongly adhere to the policy that unlawful entry into homes and seizure of evidence cannot be tolerated." *Id.* Thus, it appears that our state constitution precludes application of the doctrine in "knock-and-announce" cases.

But even assuming that the doctrine is not constitutionally precluded, the argument fails. The leading "inevitable discovery" case is *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501 (1984). In *Williams*, which was *not* a "knock-and-announce" case, the police used the "Christian burial" speech to coerce Williams into disclosing the location of his victim's body. At the time the body was found with Williams's help, a search party was only two-and-one-half miles away from the body, and the body was within the area to be searched. *Id.* at 435-36, 104 S.Ct. at 2505. The Court held that evidence regarding the body was admissible under the "inevitable discovery" doctrine. "[I]nevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification." *Id.* at 444 n.5, 104 S.Ct. at 2509 n.5. When "the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible." *Id.* at 448, 104 S.Ct. at 2511.

At least one federal court has rejected the "inevitable discovery" doctrine in "knock-and-announce" cases. In *United States v. Shugart*,[10] an informant told the police that he had been on Shugart's property and seen a meth lab, meth, and chemicals used to produce meth. *Id.* at 967. The informant also said that while on the property, he had helped Shugart manufacture meth. *Id.* at 968. After conducting some surveillance, the police obtained search warrants. Before serving the warrants, they discussed that Shugart had a prior weapons offense, and that they had seen a person in an adjacent garage who might be a safety risk. They did not "knock and announce" when serving the warrants; instead, they burst through the home's closed, unlocked front door with their firearms drawn. *Id.* at 969. The Court suppressed the evidence found in the home. *Id.* at 978.

First, the Court recognized that the remedy for a violation of the federal "knock-and-announce" statute is "suppression of the evidence obtained as a result of the unlawful governmental entry." *Id.* at 971. It then rejected

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several arguments advanced by the government, including the "inevitable discovery" doctrine. That doctrine was inapplicable because the government failed to prove that the evidence seized from the home "would have been lawfully obtained but for the 'raid team's' noncompliance with the 'knock and announce' statute[.]" *Id.* at 977. "[A]pplication of the inevitable discovery doctrine to evidence seized after a clear violation of the 'knock and announce' statute would completely [e]viscerate the fundamental privacy and safety interests the statute seeks to secure." *Id.* "[O]fficers could obviate their obligation to provide notice of their authority and purpose prior to entering a person's household whenever they had a valid warrant authorizing the search of the home. . . . [They] would know their misconduct would have no unfavorable consequences, and simply stated, the exception would swallow the rule." *Id.*

Conclusion

The "knock-and-announce" rule is one of the hottest issues today in both constitutional and statutory law, at least in the federal courts. Whether the Arizona Constitution provides even greater protection than the federal constitution in this context remains untested, although *Ault*, *supra*, provides some supportive language for this proposition. Also untested is whether our "knock-and-announce" statute, A.R.S. § 13-3916(B), provides protection that is strictly co-extensive with, or protection that exceeds, the federal constitutional guarantees.

Good Luck and Happy Suppressing!!!

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1. The Arizona appellate courts have not yet addressed the "knock-and-announce" issue under the parallel provision of our State constitution, Ariz. Const., Art. 2, § 8.

2. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., Amend. IV.

3. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const., Amend. XIV, § 1.

4. The statute was renumbered as A.R.S. § 13-3916 in 1978. *See*, Session Laws 1977, ch. 142, § 142, eff. Oct. 1, 1978.

5. 357 U.S. 301, 78 S.Ct. 1190 (1958).

6. 21 Ariz. App. 417, 520 P.2d 330 (1974) (Division One).

7. 468 U.S. 796, 104 S.Ct. 3380 (1984).

8. 986 F.2d 1216, *rehearing and rehearing en banc denied* (8th Cir. 1993).

9. 150 Ariz. 459, 724 P.2d 545 (1986).

10. 889 F.Supp. 963 (E.D. Tex. 1995).

DEFENDING THE NEW WAVE OF KIDS IN ADULT COURT: CHRONIC JUVENILE OFFENDERS

By Susan White
Deputy Public Defender - Juvenile

As we are all acutely aware, the Constitution of Arizona was amended in 1996 with certain provisions designed to "get tough" on juvenile crime. Those amendments were fleshed out with implementation legislation, Senate Bill 1446, which became effective in all aspects relevant to this article on July 21, 1997. One of the most significant changes in the law is that juveniles who fall within the classification of "chronic felony offenders" will proceed directly to criminal court on felony charges.[11] Although the constitutional amendment did not define "chronic felony offenders," the implementation legislation did. To date, these juveniles have not been prosecuted as adults because the legislature inadvertently repealed the statutory authority that allows juvenile records to be used against the accused in criminal proceedings.[12] However, the legislature recently corrected its mistake in a special session. In the foreseeable future, prosecutors will begin charging many of these juveniles as adults. In fact, many juvenile court clients have already been designated as "first time" and "repeat" felony offenders, (as defined in A.R.S.8-241 (V)), and warned by the court of adult prosecution as a chronic offender.

A "chronic felony offender" is defined under the newly adopted § 13-501(F)(2) as a "juvenile who on at least two prior separate occasions has been adjudicated delinquent for conduct that would constitute a historical prior felony conviction if the juvenile had been tried as an adult." Under § 13-501(A)(6), the county attorney *must bring the case in the criminal division* if the juvenile is at least fifteen and is a chronic felony offender who is charged with any felony level offense. Under § 13-501(B)(5), the county attorney has the discretion to charge as an adult any juvenile who is at least fourteen and is charged with a felony as a chronic felony offender. Under § 13-501(D), the county attorney *must allege in the information or indictment that the juvenile is a chronic felony offender.*

Jurisdiction

The law allows a juvenile to contest the chronic felony offender allegation before trial and requires the court to transfer the juvenile back to juvenile court if it finds for the

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juvenile. § 13-501(D) provides in full, "For the purposes of establishing jurisdiction over a chronic felony offender, the county attorney shall file an information or indictment that includes an allegation that the juvenile is a chronic felony offender. Upon motion of the defendant the court shall hold a hearing after arraignment, and before trial, to determine if a juvenile is a chronic felony offender. At the hearing the state shall prove by a preponderance of the evidence that the juvenile is a chronic felony offender. If the court does not find that the juvenile is a chronic felony offender, the court shall transfer the juvenile to the juvenile court pursuant to § 8-222.

Obviously, classification as a "chronic felony offender" determines jurisdiction -- criminal over juvenile court. However, the classification also carries with it certain requirements upon sentencing, (discussed further in this article). Consider whether proof by a preponderance of the evidence at the pretrial hearing meets the requirements of due process. It is doubtful the juvenile will have a second chance to contest the proof of priors again after trial. In all likelihood, the only time to litigate "chronic offender" issues will be before trial, and, if you wait, you waive.

"In all likelihood, the only time to litigate 'chronic offender' issues will be before trial, and, if you wait, you waive."

Ex Post Facto

Another primary concern regarding the first wave of kids who proceed to adult court as alleged chronic offenders is that they be prosecuted in compliance with the *ex post facto* clauses of the federal and state constitutions. In *Saucedo v. Superior Court*, division one of the court of appeals held that the new "automatic transfer" provision of the constitution affecting juveniles may not be applied retroactively.[13] The *Saucedo* opinion holds that eligibility to be retained in the juvenile court and to receive the less punitive consequences there invokes *ex post facto* protection. The court determined that any retrospective application of the new constitutional provisions bringing juveniles into adult court "is clearly forbidden under the *ex post facto* clause".[14]

Prior to July 21, 1997, no juvenile was subject to prosecution as a "chronic felony offender" - that legal status simply didn't exist. At a minimum, any charges to be tried in the criminal division must have occurred after July 21, 1997. If the charges predate the effective date of the bill, the court should find that the juvenile is not a chronic offender and transfer the case to juvenile court. If the court denies your request for transfer to juvenile court, the issue is ripe for special action review. Some of you may wish to argue that the prior juvenile adjudications must also have occurred after July 21, 1997. There is no case law directly on point to this issue; however, case law in the area of habitual or recidivist offender classification almost universally holds that only the current offense must have occurred after the enactment of the habitual offender legislation.[15]

Notice

Whether the juvenile received fair warning, however, may become an issue under the new laws. Obviously, juveniles received no notice of any consequences related to "chronic felony offender" status before July 21, 1997, because that classification had not yet been defined. By statute, § 8-241, juvenile court judges are now required to give felony level juvenile offenders "first offender" and "repeat offender" warnings in writing.[16] This statutory section carries a disclaimer though, declaring that the adjudication may be used against the accused even if the court does not give the appropriate warning.[17]

Delinquent vs. Felon

The change in the laws does not account for one problem that can not be overlooked. Before Senate Bill 1446 went into effect, juvenile dispositions did not necessarily depend upon any particular identification of the offense as a "felony" or even the distinction between a misdemeanor and a felony for that matter. It is true that in recent years, the type of offense has become more determinative of what happens to a juvenile. The Department of Juvenile Corrections uses Title 13 classifications of crimes in its length of stay guidelines. Although not obligated to, judges use these guidelines when committing children to DOJC. Certain sex offenses now allow for DNA testing and sex offender registration.

This year, the juvenile court began fingerprinting felony level offenders pursuant to statutory mandate. So in reality times have been changing. Nevertheless, as a matter of law, all offenses were, and still are, delinquent offenses. Not felonies, not crimes. Juveniles are not "convicted" of "felonies." They are adjudicated delinquent.[18] Juvenile adjudications may only be treated as convictions for legal purposes under very specific exceptions as decided by the legislature. (This may be one of those exceptions). But the term "felony" carries no other legal significance in juvenile court. Some case may present a viable defense on the grounds of lack of actual

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or constructive notice that the juvenile had previously committed a "felony" offense.

Since July of this year, in light of the changes in the law, some juvenile court judges have agreed to designate a felony level offense as a misdemeanor either at the time of disposition, or once the juvenile has successfully completed probation. This is to say that the prosecutor may not be relying on accurate information. Reviewing the client's juvenile legal file is imperative. Please note that prosecutors have ready access to a computerized document called a "Juvenile Profile." This is not a legal document. It is a snapshot of the client and his history in juvenile court that is generated by the probation department. The profile often contains inaccurate information. The best sources of information, short of ordering transcripts, are the minute entries reflecting the charges the juvenile admitted to or was found guilty of. The minute entry of the disposition (equivalent of sentencing) is not as reliable as the minute entry from the actual plea or adjudication hearing.

"Please note that prosecutors have ready access to a computerized document called a 'Juvenile Profile'. . . The profile often contains inaccurate information."

Consequences of "Chronic Felony" Status

The potential consequences to the child in adult court under the new "chronic felony offender" laws is great. Under newly adopted § 13-608(A), a chronic felony offender who is sentenced to probation must serve a term in jail. (This provision begs for a challenge on equal protection grounds!) Under § 13-608(B), the sentencing court is also required to instruct the juvenile that he now has a historical prior felony and that if he is at least fifteen years old and commits another felony, he will be subject to mandatory sentencing. Yes, fifteen years old, mandatory sentencing!

However, in certain cases, pursuant to § 13-921, the court will be allowed to impose a hybrid "dual adult juvenile probation" that may work to the client's benefit. This is not just for the chronic offenders. If the client is under eighteen, is convicted of a felony and not sentenced to prison, he may be placed on probation pursuant to this section and reap certain benefits, such as having the judgment set aside and his record expunged upon successful completion of probation. More innovative is subsection D, the provision that the criminal court may utilize services available in juvenile court. The juvenile court not infrequently places juveniles in residential or outpatient treatment programs and provides other services at no cost to the client. Under § 13-921(F), a criminal judge may also opt to incarcerate a juvenile in a juvenile detention facility as opposed to a county jail. For some clients, this may prove to be an enormous qualitative difference.

Conclusion

These are just a few ideas to keep in mind as these clients begin to show up on your caseload. Certainly, many more issues will arise. I'm sure it's safe to say any of us in the juvenile division would be willing to help you dig, sort, interpret, and prepare as these cases go forward!

11.Article IV, Part 2, Sec. 22(1) of the Constitution now provides in part, "Juveniles fifteen years of age or older who are chronic felony offenders as defined by statute shall be prosecuted as adults."

12.See A.R.S. §. 8-207.

13.*Saucedo v. Superior Court*, 1997 WL 539301, 251 A.A.R.25 (App.) (Still pending review before the Supreme Court of Arizona).

14. Id.

15.In *Gryger v. Burke*, 334 U.S. 728, 68 S. Ct. 1256 (1948), the Supreme Court upheld a sentence penalizing the defendant under a newly enacted Pennsylvania habitual offender statute, against an ex post facto challenge, even though one of his previous crimes had been committed before enactment of the statute. The court reasoned that the sentence as a habitual offender could not be viewed as a "new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." In *State v. Yellowmexican*, 142 Ariz. 91, 688 P.2d 983 (1984), and similar cases, Arizona has followed *Gryger* with respect to ex post facto challenges to sentences imposed under provisions in Title 13 and Title 28 that enhance punishment for repetitive crimes. Other jurisdictions have adopted similar analyses.

16.See A.R.S. 8-241 (C) and (E) respectively

17. See A.R.S. 8-241 (F).

18.See *Webb v. Rose*, 20 Ariz. App. 450,452, 513 P.2d 988, 990 (1973); see also *Maricopa Cty. Juvenile Action No. 508801*, 183 Ariz. 175, 901 P.2d 1205 (App. 1995), rev. denied.

Just the FAQs
Qs & As About Our CD Legal Research System

By Jim Haas, Senior Deputy, and Chuck Brokschmidt, IT Project Manager

"The new phone book's here! The new phone book's here!
. . . Things are going to start happening to me now!"
- Steve Martin, *The Jerk*

That scene from *The Jerk* came to mind in early January, when we received a delivery of CDs from West Publishing and Matthew-Bender. After nearly two years of study, meetings, confusion, sales pitches, negotiation, starts and stops, MCPD was finally on the verge of providing desktop electronic legal research. Hopefully, the system will soon be up and running. (Unfortunately, another snag developed when the hardware arrived last week in a damaged condition, which could delay implementation until late February.)

This article will attempt to answer the most frequently asked questions (FAQs in Internet lingo) about our new CD legal research system. It will no doubt raise more questions than it answers, but hey, we'll do the best we can.

Just what are we getting?

Our CD system includes the following titles: *ARS Annotated, Arizona Reports, Arizona Digest 2d, Pacific 2d, Ninth Circuit Reporter, Federal District Court Reporter - Ninth Circuit, Supreme Court Reporter,* and *Shepard's*. Each title includes a free on-line update bank, which provides access to new cases within twenty four hours (or so) after they come down. In other words, while researching an issue, you can go directly on-line to see if there is anything new out there.

We chose these titles after an exhaustive study of our research needs. (Actually, we just asked Paul Prato.) They should provide the vast majority of what we need. Other services are also available on-line (more on that below).

What's the difference between CD and "On-line" research?

One costs a lot. The other costs A LOT. "On-line" refers to the use of the vast libraries maintained on Lexis's and Westlaw's mega-computers. You received it free in law school or paralegal school, if you attended in the last ten to fifteen years. You log onto their computers via a modem, special terminal, or, in our case, through the county network, and you have access to the legal and information universe . . . for a price. Once they have you hooked in school, they later make you pay for this service *by the minute*.

The CD system resides on our own computer system, and is limited to the CD titles and licenses we buy. We have a CD tower/server in our IT area, with thirteen CD drives and a 23-gigabyte hard drive. We have unlimited access to the CDs on our system and their on-line update banks. We pay a fixed license fee, no matter how much time we spend on the system. The only limitation is that only a certain number of users can use the same title at the same time (more on that below).

What if I need something that is not on our CD system?

On-line research is still available for those situations where you simply must know how the courts have treated your issue in Rhode Island. But this is really expensive, especially when added to the cost of the CDs. On-line research will only be available on a project-by-project basis, with supervisor approval. If you have a project where you need to do a nationwide survey of the law, you can fill out a form akin to our Request for Funds form. You explain why you need to go on-line, give your best estimate of the time on-line you will need, explain why it cannot reasonably be done at the county law library, and, if it all makes sense, you're approved! You then call Rose Salamone, who will obtain a password for you by phone. After you're done with the project, you tell Rose, so she can deactivate the password. When the bill comes, the charges are itemized by password. So remember, we know who you are.

The need for on-line research should be rare, but it will come up now and then. Obviously, you should do a little planning when it comes to this kind of research. Try to do this when the library is open to avoid the need to go on-line as much as possible.

What hours is the system available?

For the most part, the CD system is available whenever our computer system is available. It is available after normal work hours and on weekends. It should only be down when maintenance is needed, disks are being changed, or when the network itself is down.

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In the near future, you should even be able to access the system from your home computer. We were actually working on remote access when we were asked by the county Chief Information Office to hold off for now. The CIO is working on a county-wide method for employees to access the county network from home, and asked us not to create any more "gateways" into the system for the time being.

Can we all do research on this system at the same time?

The answer to this question is no, and the reason is the mystical concept of the "concurrent user license." We have twenty concurrent user licenses for most of the titles, meaning that twenty people can use that title at the same time without anyone going to jail. We have fewer licenses for *Pacific 2d, Shepard's*, and *Arizona Digest 2d*, because they should be used less or for briefer periods of time.

Of course, this means a couple of things: one, there may be times when you cannot access a particular title because there are already twenty people using it at the same time; and two, you need to do your research efficiently and *remember to log off*, so that you are not using up a license and keeping someone else from using it.

The question of how many concurrent user licenses to buy was easily the most frustrating issue we had to deal with in setting this all up. It seems that nobody, and we mean *nobody*, knows how to figure this with any accuracy. It is hit or miss; we might have too many licenses for some titles and too few for others. We just don't know. We will therefore need feedback from you when you cannot access a CD, so we can determine whether we need to buy more licenses.

Again, this will require some forethought and planning on your part. Try to do your research when you figure few others will, and you should not have any difficulty.

What about training?

Most everyone who went to law school or paralegal school in the recent past got free training and unlimited use of Westlaw, in a transparent attempt to addict them to on-line research. Lots of others in the office have been trained on Westlaw at some point. The CD system uses a software product called Premise, which we are told is virtually the same as WestMate, the on-line product that supports Westlaw. Therefore, many attorneys and litigation assistants in the office won't require additional training.

For the rest of us, we are working on arranging training. West's training lab is in the Renaissance complex across the street, and the training is free. But we are trying to arrange for training in our Training Facility.

Will we still have books in the libraries?

The question is not whether we will have books, it is whether they will be up-to-date. We have already canceled the updates to the books that will be on CD, and many other titles which never got much use anyway. We will update the treatises and books that are presently in our reserve libraries, as most are not available on CD. We will keep a hard copy of Arizona Reports up-to-date in the Appeals Division's third floor library, and a few sets of ARS. But that's about it. For the most part, if you need something that is not on the CD system, or if you decline to become computer-research literate, you'll probably have to go to the county law library.

Like the implementation of our computer network itself, this is a complex project that will be a work in progress for some time. There will be bugs to work out, so please be patient. Experiment with the system, and let us know when you have problems or discover something exciting.

If you have any other questions about the CD system, or anything else for that matter, please contact Jim Haas, Chuck Brokschmidt, or Rose Salamone.

ARIZONA ADVANCED REPORTS

By Terry Adams
Deputy Public Defender - Appeals

***State v. Greer*, 257 Ariz. Adv.Rep. 3 (CA 111/25/97)**

The defendant and the victim got into a fight which resulted in the victim's death. The defendant then buried the body in a remote area. He was ultimately convicted of second-degree murder and sentenced to an aggravated 18-year sentence. On appeal he argued that Ariz. R. Crim. P. 18.6(e) violates his constitutional right to an impartial jury by permitting jurors to submit questions to witnesses. Following a discussion, the Court of Appeals found no such violation. The court also found that the court reporter's failure to record the polling of the jury did not constitute fundamental error.

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***State v. Medrano-Barraz,* 257 Ariz. Adv. Rep. 10 (CA 1, 12/4/97)**

After a jury trial, the defendant was convicted of criminal trespass. He admitted to having two historical priors. The trial court failed to completely advise the defendant of all the rights he gave up by admitting the priors. The issue on appeal was whether or not he is prohibited from taking a direct appeal as opposed to a rule 32 on this issue since he admitted the priors. Since he was tried and convicted on the underlying charge, A.R.S. § 13-4033(B) does not bar a defendant from seeking appellate review of a sentence following an admission of priors under these circumstances.

***State v. Brun* 258 Ariz. Adv. Rep. 18 (CA 1, 12/11/97)**

Defendant was charged with misdemeanor DUI. At the time of his arrest, his Illinois driver's licence was suspended. He filed a demand for a jury trial and a motion to suppress his statements. While these were pending, the state filed a motion to dismiss and re-filed the case as a felony. The defendant filed a motion to dismiss for prosecutorial vindictiveness which was granted. The state appealed. The Court of Appeals reversed. The court adopts a standard for evaluating an allegation of prosecutorial vindictiveness in a pre-trial setting. As near as I can tell it is: There is no *per se* rule applicable in the pretrial context that a presumption of prosecutorial vindictiveness will lie whenever the prosecutor "ups the ante" following a defendant's exercise of a legal right. However if there are additional facts combined with this sequence of events to create a realistic likelihood of vindictiveness, a presumption will lie in the pretrial context. That standard was not met here. This case is a good discussion of this issue.

***State v. Thorne* 258 Ariz. Adv. Rep. 20 (CA 1, 12/11/97)**

The defendant was charged with attempted first degree murder and two counts of aggravated assault, all non-repetitive dangerous felonies. Before trial the court dismissed the allegation of dangerousness as to one count of aggravated assault. The parties also stipulated that, if convicted, the defendant would have to be sentenced concurrently on one aggravated assault and the attempted murder. As a result, the maximum sentence he could have received was 29.75 years. He was tried by an 8 person jury. He appealed, arguing that he was entitled to a 12 person jury, because when originally charged he faced a sentence of more than thirty years. In Arizona, a 12 person jury is required for all criminal cases in which the sentence authorized by law is either death or imprisonment for thirty years or more. Ariz. Const. Art. 2, §23; A.R.S. §21-102(A). The court held that the determination of the maximum potential sentence may be made at any time prior to the submission to the jury. Therefore the original charges don't matter. Also the court was bound by the stipulation of the parties as to concurrent sentences.

SELECTED 9th CIRCUIT OPINIONS

By Louise Stark
Deputy Public Defender - Appeals

Bloom v. Calderon, 1997 U.S. App. LEXIS 35988, (9th Cir. 1997)

Ineffective Assistance

Defendant was convicted of first degree murder of his father, stepmother, and stepsister. Bloom, 18 years old, claimed that his father killed his stepmother, after which defendant killed his father, then went into a "transitory state" in which he killed his young stepsister. He entered not guilty pleas to killing the two adults, but NGRI to killing the child. He stuck to this story at trial, despite considerable and damning evidence that he got the gun in advance, and shot his father first. After the guilty verdicts came, defendant's request to represent himself in the penalty phase was granted. He presented no mitigation, and he requested the death penalty, which was imposed.

The murders happened in April 1982. Defense counsel was appointed in early August. In April, 1983 the defense had a neurological exam done, which did not add to any insanity defense or mitigation. Despite having a court order allowing appointment of a psychiatrist, no expert was contacted by the defense until the first week of August, 1983. With trial 20 days away, the selected expert, Dr. Kling, said he could do an exam and report within a week, and requested all and any available data on Bloom. He was given a preliminary hearing transcript, a neurological report, and a few writings from Bloom and his mother which hinted at, but gave no instances of, abuse inflicted on Bloom. There was nothing about his medical history outside of a near drowning, and no instances of him exhibiting mental or emotional illness. Dr. Kling was asked for an opinion on whether defendant, at the time of the killings, had the capacity to: form specific intent, premeditate, deliberate, harbor malice, or meaningfully and maturely reflect on the gravity of his acts.

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After a 90 minute interview Kling concluded Bloom was sane, and able to form the mental states necessary for first degree murder. He did not find one item that supported a defense or mitigation. Defense counsel nevertheless used Kling at trial. A week before trial, and after an additional exam of defendant during trial, Kling added that defendant was possibly unable to control his behavior at the time of at least his stepsister's killing, with a diagnosis of schizotypal personality disorder that could cause transient psychotic episodes under extreme stress, during which defendant might suffer amnesia and be unaware of his actions. The state made effective use of the first report to show that there was no insanity defense.

Readily available to defense counsel, but never uncovered or presented, was evidence that both sides of Bloom's family had a long history of mental illness and domestic abuse, that defendant had been subjected to physical and mental abuse since early childhood, as well as suffering various medical crises which either by themselves contributed to cognitive deficits and brain damage, or necessitated the use of drugs that damaged his mental and organic health.

Five months before the murders the court system found him in need of inpatient psychiatric care. Jail records reported a suicide attempt and hallucinations. Various other doctors who had examined Bloom during the trial now testified that the lack of background information caused their reports and conclusions to be incorrect. The new, post-trial information caused the experts to conclude that Bloom had substantial cognitive, sensory-motor and brain dysfunctions as the result of his childhood and adolescent experiences, that he shot his father due to "deep terror...[and that] any reasonable person in a similar situation would react similarly." They felt he had not had the capacity to deliberate, premeditate, harbor malice or reflect on his acts. This court reversed the convictions based on ineffective assistance of counsel in not presenting psychiatric evidence.

United States v. Bauer, 1997 U.S.App. LEXIS 35892, (9th Cir. 1997)

Confidential Communications Attorney/Client Privilege

Convictions for false statements on bankruptcy petition, and omitting assets from bankruptcy petition are reversed due to violation of attorney-client privilege when bankruptcy lawyer testified in the criminal trial.

Bauer transferred some assets in the months just preceding the filing. He never mentioned certain items of personal property, and acquired assets during the pendency of the bankruptcy action. At the criminal trial, over objection, the bankruptcy lawyer was asked "without asking about privileged communications, did you advise him prior to filing that there is a duty to disclose all property? And did you advise him that a bankruptcy petition is filed under penalty of perjury?" The lawyer answered that 'we went through the disclosure...which included all the property that he told me he had. I think we covered that they were signed under penalty of perjury.'

The trial court concluded that these statements about duty to disclose, and perjury, were not covered by attorney-client privilege. This Court repeats that it is not just the client's disclosure to the lawyer, but the lawyer's advice in response that are protected by confidentiality. This was distinguished from cases in which a lawyer's telling the client of a court date, or passing on a copy of an IRS notice is not privileged. In those cases the contents of the message passed on is public information, not protected by the privilege. Nor did the evidence come in under the crime-fraud exception to attorney-client privilege, as there was no indication that the advice was used in furtherance of a crime, rather it was ignored where following it would have prevented the crime. In this instance, violation of the privilege was not harmless, and the convictions were reversed. But the error does not rise to the level of constitutional error, and may be harmless in other instances.

United States v. Uchimura, 125 F.3d 1282 (9th Cir. 1997)

Defendant convicted of filing a materially false tax return. At time of trial, materiality of the false statement was a question of law for the court to determine, rather than a jury question. This was subsequently reversed when the Supreme Court made clear that materiality was an element of the crime which a defendant had a right to have a jury decide in *United States v. Gaudin*, 115 S.Ct. 2310 (1995). Because the law was so well settled against defendant at the time of trial, failure to request an instruction or object to the court's determination of materiality did not automatically waive the issue. This Court agrees that Uchimura had a right to have the jury decide if false statements were material. But the evidence showed beyond reasonable doubt that defendant substantially understated taxable income, which was clearly necessary to determining whether taxes were owed. Therefore the error did not seriously affect the fairness,

(Cont. on page 16)☞

integrity or public reputation of judicial proceedings, i.e. no reversal, conviction affirmed.

United States v. Cruz, 127 F.3d 791 (9th Cir. 1997)

Conspiracy

Codefendants Cruz and Mesa appeal their convictions for conspiracy to distribute methamphetamine, and possession with intent to distribute. In addition, Cruz appeals a conviction for attempted possession with intent to distribute.

Mesa hired his fiancee's brother "B" to act as courier to transport drugs from California to Guam. En route "B" and a companion, Taitano were arrested in Hawaii on an anonymous tip. After first claiming that Taitano was the principal, "B" agreed to snitch, and made some phone calls. As a result of those calls "B"'s cousin, Cruz, was assigned to finish delivery of the drugs in return for $3,000.00. Cruz later called and affirmed he would be there for the drugs. Cruz was videotaped when he tried to pick up the meth that had been replaced with rock salt. When arrested he had a half gram of meth and plastic bags on his person.

Cruz argues that no conspiracy existed at the time of his involvement because the object of the charged conspiracy was already defeated, after the courier was arrested and the drugs seized. This court agrees, pointing out among other inconsistencies that payment of the replacement courier, Cruz, was not an object of the original conspiracy, merely a means used to carry out the objectives of the original, thwarted conspiracy.

The conspiracy conviction is reversed as to Cruz, as no rational trier of fact could find beyond a reasonable doubt that the conspiracy was still in existence at the time he became involved. He is likewise not liable for the substantive offense, possession with intent to distribute, committed by the co-conspirators who were involved from the start. By the time he joined the scheme, the drugs were seized and he could not be accountable for the earlier possession by the others, so that conviction is reversed.

Motion to Sever

Mesa, Cruz, and Taitano were tried together. "B" and the intended buyer in Guam were government witnesses at trial. Mesa was the one who hired "B", got Taitano to accompany him, and hired Cruz. Mesa argues that failing to sever his trial from the others' was reversible error, where his defense was to attack the credibility of the witnesses. Cruz testified in his own entrapment defense, admitted his role, and implicated Mesa. Taitano's testimony that he was just along for the ride, and was wrongly fingered when "B" first lied about who set up the deal, tended to implicate Mesa. The court rejects Mesa's contention that the defenses are irreconcilable, although they are antagonistic.

The jury was properly instructed to consider the evidence against each separately, and that certain evidence was only to be used against particular defendants. The jury could have believed Taitano and/or Cruz as to their defenses, but still found insufficient evidence against Mesa. Additionally Mesa's argument fails because the substance of the codefendants' testimony was not inadmissible against him. Conviction affirmed.

Calderon v. United States District Court (Kelly, real party in interest) 127 F.3d 782 (9th Cir. 1997)

Kelly committed three murders in separate incidents in 1984. By January 1992 the three death sentences had been upheld in appellate and post-trial state court proceedings. Kelly then began proceedings in federal court by having an attorney and psychiatrist appointed; he obtained stays of execution, but never filed an application for writ of habeas corpus.

After several years the state moved to dismiss the federal proceedings, and appealed when this motion was denied by district court. The motion to dismiss is granted by this court, which repeats that the 1996 Antiterrorist Effective Death Penalty Act (AEDPA) is retroactive, imposing a one year statute of limitations on filing for habeas on any person whose application or petition had not been filed before its enactment. They also reject the proposition that mental incompetency requires tolling of the time limit even if true, as Kelly is represented. Any claim that a presently incompetent person cannot be executed is premature. This was in the face of district court orders tolling the AEDPA time limit, granting stays and incomplete proceedings to judicially determine his mental status.

United States v. Chan-Jimenez 125 F.3d 1324 (9th Cir. 1997)

A Tohono O'odham officer was in an unmarked pickup, wearing a t-shirt, camouflage pants, gunbelt, ammo, and a badge. He noticed a dusty pickup with a tarp over the bed, traveling westbound around 2:30 p.m. on AZ Route 86. He followed it for 1.5 miles without seeing any traffic violations. Despite admitting that dusty pickups are not unusual here, he claimed this one didn't appear to belong in the area, and felt it might contain contraband.

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The plates came back registered to Chan at a Florence, AZ address.

As he followed the truck, it pulled to the side of the road. While the engine ran, Appellant and a passenger raised the hood. The officer immediately pulled behind them, put on an emergency light, and identified himself as police. He kept a hand on his gun throughout the encounter. He demanded defendant's driver's license, and asked who owned the truck, getting the response that defendant did. The license and vehicle registration were in order, but he did not return them to defendant. Instead he asked to search the truck and bed, still with his hand on his revolver, and without explaining that consent was not required. Defendant did not speak, but slowly undid the tarp, allowing a view of a white sack. Believing it to contain marijuana the officer drew his gun and yelled "hands up" in Spanish, prompting defendant and his passenger to run into the desert. About 245 pounds of marijuana were seized from the truck and the two men arrested shortly thereafter.

Seizure-4th Amendment

The trial court denied the motion to suppress based on an illegal seizure of Chan without reasonable suspicion, finding there was no seizure. This court reverses the convictions, finding that there was a seizure when the officer did not offer to return the registration and license while initiating further inquiry, that a reasonable person in this situation would not feel free to leave, and the seizure was without reasonable suspicion.

Search-4th Amendment

The trial court denied a motion to suppress based on lack of valid consent, finding no coercion connected with the request to search. This court reverses on that basis as well. The circumstances of the request were coercive, and obeying the order was not voluntary consent. The court reviews five factors in looking at valid consent: whether the person is in custody, the officer's weapon is drawn, Miranda warnings are given, the right to refuse consent is explained, and the option of using or requiring a search warrant is explained.

United States v. Klinger 128 F.3d 705 (9th Cir. 1997)

At trial, defense counsel requested a particular definition of "knowingly" that was different from those proposed by the court and the government. No actual objection was voiced to the one given. The given instruction was later held to be reversible error, a ruling that would have been retroactive to this case, if there had been a specific objection to the given instruction. Because there was no objection, the standard of review was "plain error," allowing the court to find that, in the context of this trial and the other instructions given, the error did not affect substantial rights, or the fairness of the trial.

BULLETIN BOARD

New Attorneys

Six attorneys will join our trial attorney ranks in February. They will take part in Russ Born's three week training class, which begins on February 9. Here is a brief background of them:

Ted Crews graduated from Hamline University (Minnesota) School of Law last year and was admitted to the Arizona Bar this past October. Prior to law school he worked for two criminal defense law firms as an office manager and legal assistant.

Amy Mabius is a graduate of Gonzaga University School of Law and was admitted to the Arizona Bar in 1995. Since then, her experience has included employment at Aspey, Watkins, and Diesel as a criminal defense attorney, and a year as an Assistant City Prosecutor for the Flagstaff City Attorney's Office.

Robert Precht graduated from John Marshall Law School in Chicago in 1996. After his admission to the Illinois Bar, he became a staff attorney at the Hispanic Council, followed by private practice in the fields of misdemeanor criminal law and personal injury.

Damon Rossi graduated from the University of Arizona in 1996 and was admitted to the Bar that same year. He was an associate attorney with Ronald Lebowitz for one year in the civil litigation field, primarily in the areas of employment and constitutional law.

Derek Zazueta has been serving in our Initial Services unit since December 8, 1997. Derek graduated from ASU's College of Law and was admitted to the Bar in 1995. Since then, he has been involved in sports law issues.

Jeffery Zick comes to us from Wisconsin, where he has practiced since 1990. His private practice consisted primarily of criminal defense work. He is a former Board member of the Wisconsin Association of Criminal Defense Lawyers. Jeffrey graduated from the William Mitchell (Minnesota) College of Law.

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Attorney Moves/Changes

Carole Larsen, a Group D attorney, resigned effective January 30.

Lisa Shannon, an attorney with Group C, resigned effective January 30.

New Support Staff

Sheila Brazinskas, joined the office as an Investigator on January 26. She is a transplant from Georgia where she served as a police officer for several years. She has spent the last 6 years as a public defender investigator. She will be joining Trial Group A.

Jacqueline Conley, Legal Secretary, joined the office on January 20. Jacqueline recently graduated from the American Institute in Phoenix with a degree in Legal Secretary Studies. She was assigned to Trial Group C.

Racheil Drake, assumed a temporary position as Legal Secretary for Group A on January 13. Racheil holds a A.A. in Legal Studies from the American Institute, as well as a B.S. in Accounting from De Vry Institute.

Michelle Molina, began working as a Legal Secretary for Group A, on January 26. Michelle is a graduate of the Pima Community College Paralegal program. She most recently was employed as a paralegal/office manager for a private law office.

Gary O'Farrell, Investigator, became a member of Trial Group D on January 5. Gary retired from the U.S. Marshall's Service after 20 years, and has recently been employed as a legal assistant/investigator for private law firms. He holds a A.A. degree in Paralegal Studies from the American Institute in Phoenix.

Nancy Shevock, became an Office Trainee for Trial Group D, on January 12. Nancy holds an Associates Degree from Erie City Community College.

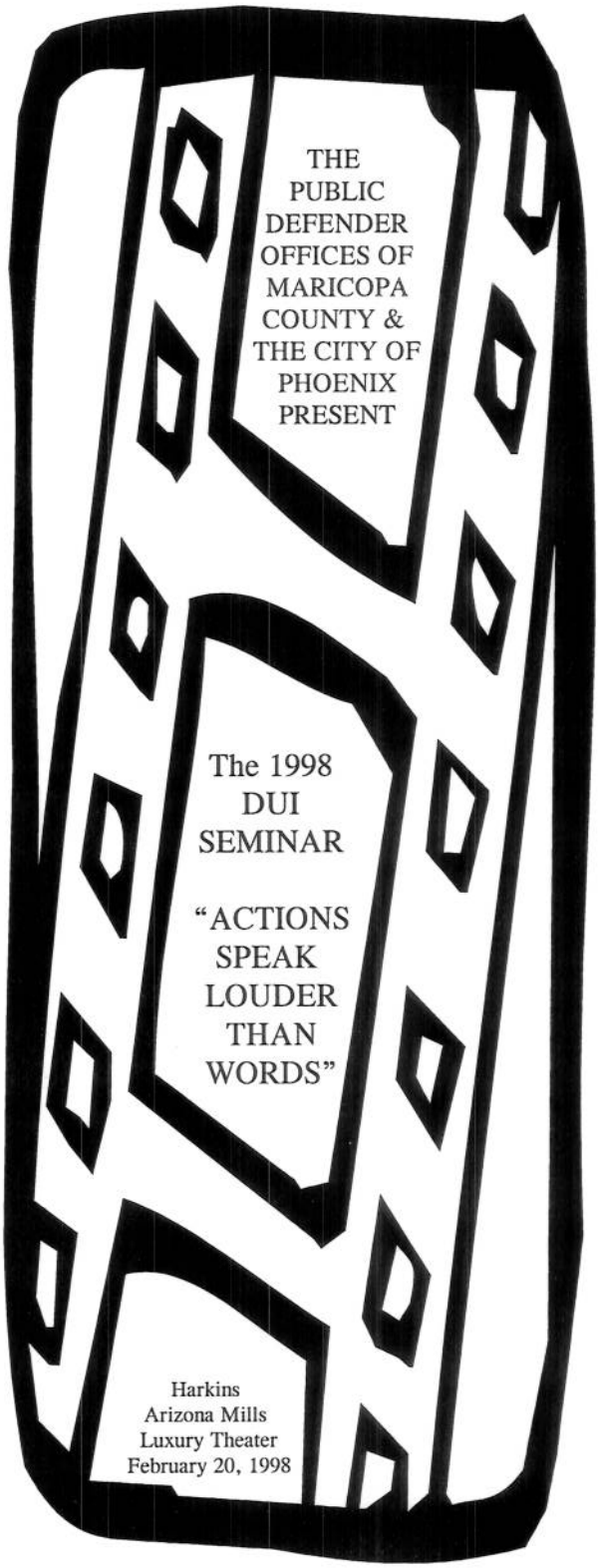
Support Staff Moves/Changes

Jeannine Jisr, Legal Secretary for Group A, resigned from the office effective January 21.

Stacy Morris, Legal Secretary, resigned from the office effective January 30. She was assigned to Group C.

Iris Pais, is now an Office Trainee for Trial Group D. Iris had been working in a temporary capacity.

MAKE YOUR PLANS NOW TO ATTEND !!



December 1997
Jury and Bench Trials

Group A

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
10/14-10/16	McAlister/ Robinson	Yarnell	McKessey	CR 97-01137 Sale of Narcotics/ F4; 2 priors	Not Guilty of Sale; Guilty of Possession - Prop. 200 applies	Jury
11/3-11/18	Kent & Ryan/ Jones	Bolton	Vercauteren	CR 97-00391 Driveby Shooting/ F2; Agg. Assault/ F2; Promoting Gangs/ F3, all dangerous, with prior and on probation	Not Guilty of all counts	Jury
11/18-11/25	Soll & Wuebbels	McVey	Hudson	CR 97-01889; Agg. Assault/F3D; 2 cts. Dis. Conduct/ F6D	Not Guilty; 1 count of Disorderly Conduct dismissed for willful prosecutorial misconduct.	Jury
11/26-12/4	McCormick	Mangum	W. Hernandez	CR 97-06289 POM/ F6; PODP/ F6	Not Guilty	Jury
12/4-12/10	McCormick	Mangum	Hudson/ Kramer	CR 97-06574 Theft/ F3	Not Guilty	Jury
12/4-12/10	Tosto/ Clesceri	Sticht	Sandler	CR 97-05071 Kidnap-Dang./ F2 (Lessor-Unlawful Impris./ F6); Burglary 1st Degree-Dang./ F2 (Lessor-Burglary 2nd Degree/ F4),(Lessor- Crim. Tresp.-Dang./ F6); Att. Sex Asslt./ F3; Sex Abuse Dang./ F5; Sex Abuse Dang./ F5; False Impris./ F6; False Impris./ F6; False Impris./ F6; Ind. Exp./ F6; Public Sex Ind., Misd.; Public Sex Ind., Misd.	Not Guilty on all counts	Jury
12/8	Ryan	R. Johnson	Patchett	TR97-00665 Misd. DUI 28-692(a)(1)/ M1; Misd. DUI 692(a)(2)/ M1	Not Guilty on Misd. DUI28-692(a)(1) D.V. on Misd. DUI 692(a)(2)	Jury
12/10-12/15	Townsend	Cole	Sobanaro	CR 97-08134 Poss. Of Methamphetamine/ F4	Guilty	Jury
12/11-12/16	Likos	Sticht	Schesnol	CR 97-09378 Agg. Asslt, Dang. with a prior/ F3	Not Guilty	Jury
12/12-12/16	Leal	Kaufman	Newell	CR 97-04819 Agg. DUI/ F4	Guilty	Jury
12/15-12/16	Lackey	Padish	W. Hernandez	CR 97-04747 Theft/ F4	Not Guilty	Jury
12/16-12/17	Tosto/Greth	Galati	Gadow	CR 97-08038 PODD/ F4	Dismissed by Court after jury empaneled	Jury
12/16-12/18	Porteous	Hilliard	McKessy	CR 97-05617 PODD/ F4	Guilty	Jury

(Cont. on page 20)☞

GROUP B

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
12/03-12/03	Walton	O'Toole	Kuffner	CR 97-08283(A) Possession of Methamphetamines/F4 Possession of Drug Paraphernalia/F6	Not Guilty on both counts.	Jury
12/04-12/04	Liles	Bolton	Ohanesian (AG)	CR 97-02280 Prohibited Possessor/F4 (w/ a prior and on parole)	Not Guilty	Jury
12/4-12/4	Navidad	Arellano	Gaertner	CR 97-04961 Burglary, Dangerous/ F2	Dismissed w/o prejudice before picking a jury	Jury
12/04-12/05	Brown, J.	Dougherty	Gorman	CR 97-08232 Aggravated Assault/F3	Not Guilty -- Guilty of Lesser Included Disorderly Conduct	Jury
12/05-12/05	Bublik	Hotham	Gorman	CR 97-09176 Theft/F5	Not Guilty	Bench
12/08-12/09	Peterson, William	Wilkinson	Petrowski	CR 97-07692 Aggravated Robbery/F3 Kidnapping/F2	Not Guilty on both counts.	Jury
12/08-12/10	Bublik/ Castro	Dunevant	Ainley	CR 97-04460 Forgery/F4	Guilty	Jury
12/10-12/16	Blieden	Ishikawa	Davidon	CR 97-07224 Aggravated Assault/F6 Resisting Arrest/F6	Not Guilty - Aggravated Assault Guilty - Resisting Arrest	Jury
12/10-12/18	Grant/ Castro	Dunevant	Mitchell	CR 97-00083 5 Cts. Sexual Conduct with Minor/F2, DCAC 1 Ct. Sexual Indecency/F5	Guilty	Jury
12/16-12/22	F. Gray/ Kasieta	McDougall	DeBrigida	CR 97-07447 Burglary 1°/F2	Not Guilty -- Guilty of Lesser Included 2° Burglary/F3	Jury
12/29-12/30	Walton	O'Toole	Rehm	CR 97-06639 Aggravated DUI/F4	Guilty	Jury
12/30-12/30	Roth	Gastelum (Maryvale Justice Ct.)	Block	MCR 97-03711 Misconduct Involving Weapons/M1	Guilty	Bench

(Cont. on page 21)☞

GROUP C

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
12/10-10/12	Bingham/ Thomas	Ishikawa	McCauley	CR 97-92459 1 Ct, Burg 2/ F3 1 Ct. PODP/ F6 1 Ct. Marij-Poss/Grow/Proc./ F6	Guilty on all 3 counts.	Jury
12/15 -12/19	Stein	Keppel	Puchek	CR 97-92494 1 Ct. Threatening or Intimidating/ F4 1 Ct. Crim. Damage/ F5	Guilty on both counts.	Jury
12/15 -12/17	Ramos	Araneta	Smyer	CR 97-93654 1 Ct. Trafficking in Stolen Property/ F5 1 Ct. Theft/ F6	Guilty on both counts.	Jury

Group D

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
11/10-12/16	Bevilacqua/ Hoff	Gerst	O'Conner	CR 96-04691 1 Ct. Murder 1/F1 1 Ct. Kidnap /F2 3 Ct. Sex Assault /F2	Guilty on Murder 1, Kidnap and 2 Ct. of Sex Assault Not Guilty on 1 Ct. Sex Assault	Jury
12/1-12/2	Billar	Kamin	Mroz	CR 97-04772 1 Ct. Sexual Conduct/W Minor/ F2 2 Cts. Child Molesting/ F2 1 Ct. Indecent Exposure/ F6	Guilty 1 Ct. Child Molest and Indecent Exposure Dismissed 1 Ct. Child Molest Hung Jury on Sexual Conduct w/Minor	Jury
12/1-12/2	Jung	Paddish	Rehm	CR 97-01734 2 Ct. Agg DUI/ F4	Guilty	Jury
12/1-12/4	Leyh	Lewis	Gialketsis	CR97-07451 1 Ct. Poss of Cocaine/F4 1 Ct. Misconduct w/weapons/ M1	Guilty	Jury
12/2-12/9	Carrion	Katz	Eckhardt	CR97-07454 1 Ct. Agg DUI/F4	Not Guilty of Agg DUI/DUI Guilty Driving on a Suspended License	Jury
12/4-12/5	Huls	D'Angelo	Pacheco	CR 97-07042 1 Ct. Poss. Methamphetamine/ F4 1 Ct. Poss. Drg. Paraphernalia/F6	Guilty	Jury
12/5-12/5	Schreck	Crum Peoria JP Ct.	Black	TR-97-06524 1 Ct. DWI (Misd.)	Mistrial on Defendant's Motion (After Jury Selection). Pled to Reckless Driving	Jury
12/8-12/10	Gavin	Rogers	Manning	CR97-02439 2 Ct. Kidnap /F2 2 Ct. Agg Assault/F3 Endangerment /F6	Not Guilty on 2 Ct. Kidnap, Guilty on 2 Cts. Agg Assault and Endangerment	Jury
12/9-12/11	Carrion	Katz	Cappellini	CR97-06020 2 Ct. Agg DUI/ F4	Guilty	Jury

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
12/9-12/11	Schaffer	Schafer	Hicks	CR97-04709 1 Ct. Poss for sale-crack/F2 1 Ct. Poss of Drg Paraphernalia/ F6	Guilty	Jury
12/15-12/16	Leyh	Bolton	Coury	CR96-09940 1 Ct Poss of Meth/ F4 1 Ct Poss of Cocaine/ F4 1 Ct Poss of Drg Paraphernalia/ F6	Guilty	Jury
12/15-12/17	Billar	D'Angelo	Myers	CR 95-07213 1 Ct. Agg. Asslt./ F5 1 Ct. Resist/Officer Arrest/ F6 1 Ct. Tres III/Real Prop-R/ M3	Guilty	Jury

OFFICE OF THE LEGAL DEFENDER

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
12/5-12/23	Steinle & Orent/ Brandenberger	Baca	B.Clayton	CR 96-09064 Murder 1/F1D Att.Armed Robbery/F3D	Guilty	Jury
12/9-12/22	C.Babbitt/ Soto	Yarnell	N.Levy	CR 96-02154 Murder 1/ F1D	Guilty, Lesser Included Murder 2d	Jury
12/15-12/22	Parzych	Ishikawa	Kunkle	CR 96-93970 Ct 1Drive-By Shooting/ F2D Cts.2&3: Agg.Asslt./F3D w/1dang.prior while on felony rel. w/int.to further crim.street gang	Guilty	Jury
11/20-12/18	Patton/ Brandenberger	Nastro	J.Wendell	CR 97-07718 Ct.1:Drive-By Shooting/ F2D Cts. 2&3: Agg.Asslt./ F3D	Guilty	Jury
12/1-12/11	Ivy/ Brandenberger	D'Angelo	L.Roberts	CR 96-05217 Ct. 9:Kidnapping/ F2D Ct.10:Sex.Asslt./ F2D Ct.11:Agg.Asslt./ F3D	Guilty	Jury

INSIDE ADDITION

The Insider's Monthly January 1998

COMPUTER CORNER

By Susie Tapia
Information Technology

After a brief hiatus from the newsletter, we're back! This month's Computer Corner offers tips for GroupWise, the Internet and WordPerfect. We will be introducing several new computer classes, so be sure to check the Training schedule for details.

What's been happening since we last visited? In November, Mesa Juvenile moved into a new building and the I.T. staff set up everyone with new computers. Previously their communication to the county via computers was very limited. Now each person at Juvenile has computer access to e-mail, JOLTS, the Internet, the VAX and word processing capabilities. This expansion was greatly needed and much appreciated by all. Welcome aboard Mesa Juvenile!

TIPS

GroupWise

Did you know that your GroupWise has **Spell Check** capabilities? Send professional e-mails by spell checking them first. You also have access to a **thesaurus** as well. If you really want to impress someone use the **Grammatik**. The Grammatik corrects your use of the English language by checking for run on sentences, passive voice versus active voice, double negatives, and can even tell you at what grade level you are writing at (if you so dare to know).

- If your button bar is active choose the spell check icon from here.
- From the pull down menus choose tools, spell checker or thesaurus
- Quick Keys: Spell Check = CTRL + F1, Thesaurus = ALT = F1
- Grammatik: pull down menu is under tools or quick key is ALT+SHIFT+F1

WordPerfect

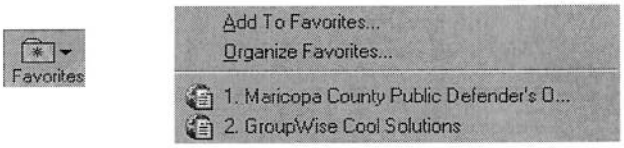
Want a short cut to GroupWise from WordPerfect? Place an icon on your tool bar that takes you straight to your **In Box**.

1. Right click on the toolbar, choose **Edit**.
2. Select **Activate Feature**.
3. The **Feature Categories = File**.
4. Scroll down the **Features** until you find **GWOpenInBox**.
5. Either choose **Add Button** to add the icon to the end of the tool bar or **drag the feature** to the place on the tool bar where you want the icon to be.
6. Choose **OK**.

Internet

Having trouble remembering those great web sites you've visited? Use your **Favorites** button on the tool bar to mark that web site. Returning to the web site at a later time is as simple as choosing Favorites, and selecting the web site.

1. Access the web site first.
2. Choose **Favorites** from the tool bar.
3. Select **Add to Favorites.** You have the option of changing the title of the web page or selecting the defaulted name.



4. To access that web page later just choose Favorites, then click on the desired web page.

The **Organize Favorites** is used to rename, delete, move or open a favorite.

Training Classes

Look for new training classes to be offered beginning in February and March. New courses will include, WP Draw, Graphics, File management, Quick Finder, Table of Contents, Table of Authorities and more. Many of these short topic classes will only be one hour in length.

If you have a topic you would like to see a course developed for, please contact the help desk or send me an e-mail.

A Reminder . . .

As a reminder it is against court policy to download any games, shareware, Internet applications, screen savers, chat programs, etc. from the Internet. These programs could

contain viruses that could infect our entire system. If you need assistance removing any items as described above, please contact the help desk for assistance. If you would like further clarification on the Internet policy, please review the policy at our web site: www.pubdef.maricopa.gov.

Happy Computing!

Help Desk x66198

PERSONNEL PROFILE

Timothy Agan
Defender Attorney, Trial Group B

This month's employee profile takes on a different look. Tim was a great sport in helping out, and being the first person to endure "The Questionnaire." Tim is an attorney with Group B and has been with the office for over 8 years. Before signing on with the Maricopa County Public Defenders, he worked as an Assistant Attorney General here in Phoenix, and he also spent time as an Assistant County Attorney in Ottumwa Iowa. He is a 1985 graduate of the University of Iowa College of Law. His hobbies include hiking, backpacking, inline hockey and attending the Iowa State Fair. Meet Mr. Timothy Agan!

What is your favorite occupation? Cosmonaut on Mir.
What is your greatest Fear? Being Brisson's spades partner.
What is your idea of perfect happiness? A chorizo and potato burro.
What is your most marked characteristic? I am short, fat and stupid, if I can pick three.
What do you dislike most about your appearance? I am short, fat, stupid and blind, if I can pick four.
What trait do you most deplore in yourself? I am short, fat, stupid, blind, and I can't skate backwards, if I can pick five.
If you could change just one thing about yourself, what would it be? I would be tall, thin, smart, perfect sighted, able to skate backwards and rich, if I could choose six things.
What is your favorite journey? The drive home.
What do you consider the most overrated virtue? Moderation.
Who is your greatest love? Emily.
Happiest moment? When Emily was born.
What is your greatest achievement? Holding on to the same job for over eight years.
What is your most treasured possession? My hiking boots.
Which quality do you most like in a man? Humility.
Which quality do you most like in a woman? Intelligence.
Who is your hero? Xena, warrior princess.
How would you like to die? Happy.
If you were to die and come back as a person or thing, what do you think it would be? An old sock.
If you could choose what to come back as, what would it be? A thunderstorm.
What is your Motto? That's my story and I am sticking to it.
Favorite cartoon character? Bullwinkle.
Favorite cartoon babe? Belle.
Favorite cartoon villain? Cruella De Ville.
Favorite Phoenix building? The old City Hall/ Courthouse Building.
Favorite restaurant? John and Kathy's Smoke Shop.
Favorite camping spot? The inner basin of the Peaks.
Favorite backpacking spot? Horseshoe Mesa.
If you could go on one date with any historical figure, who would it be? Emily Dickinson.

THE LIGHTER SIDE